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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. .....

M. L. TOWNSEND,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

M. L. TOWNSEND, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on November 22, 1950.

Opinions Below.

The Order of the National Labor Relations Board [R. 88] was issued on May 12, 1949, and is not reported. The Opinion of the Court of Appeals [R. 100] is reported in 185 F. 2d 378.

Jurisdiction.

The judgment of the Court of Appeals was entered on November 22, 1950. [R. 107.] The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1251(1).

Questions Presented.

1. Whether or not the National Labor Relations Board can take judicial notice of a case, in which petitioner was not a party, without a request to do so, and if it can has it properly and legally taken judicial notice in the instant matter.

2. Whether the Labor Management Relations Act of 1947 is applicable to franchised retail automobile dealers who buy and sell all of their merchandise within the boundaries of the State of California.

3. Whether the Circuit Court of Appeals may decide a case such as here presented without having the full record before it, as the statute requires.

4. Whether the National Labor Relations Board is conclusively bound by the Intermediate Report of its Trial Examiner when no exceptions to such report are filed by the General Counsel within the time allowed by the statute or extended by the National Labor Relations Board.

5. Whether the National Labor Relations Board has afforded petitioner the requisite due process of law.

Statute Involved.

The pertinent statutory provisions are printed in Appendix A, *infra*, pages 1 to 7.

Statement.

Upon charges filed by the Initernational Association of Machinists, a Labor Organization, the National Labor Relations Board, by its General Counsel, issued a complaint against petitioner. The complaint was heard before a Trial Examiner, duly appointed by the National Labor Relations Board. During the course of such hearing the Trial Examiner pointed out to the General Coun-

sel the latter's failure to show the origination of certain purchases of new Hudson automobiles and the possible result that such failure might lead to the dismissal of the cases for want of proven jurisdiction of the National Labor Relations Board. [R. 37-42.] The hearing was concluded without the General Counsel offering proof on these points, and the Trial Examiner stated he would not go beyond the scope of the transcript of the hearing to determine the question presented. [R. 39.]

After the cause had been submitted to the Trial Examiner, he thereafter issued his Intermdiatee Report and Recommendations, on October 27, 1948 [R. 44-50], in which he held that because of the failure of the General Counsel to adduce evidence with respect to the originations of the new Hudson automobiles, the evidence in the record, was not sufficient to warrant a finding that petitioner was engaged in business operations affecting commerce within the meaning of Section 2(6) and (7) of the Labor-Management Relations Act of 1947[1] [R. 49.] The Trial Examiner, therefore, recommended that the complaint be dismissed *in toto*. [R. 49-50.] He further recommended that in the event no statement of exceptions to his Intermediate Report and Recommendations was filed as provided in Section 10(c) of the Labor-Management Relations Act of 1947[2] and the Rules and Regulations of the National Labor Relations Board Section 203.46 and 203.48 (the rules are printed in the appendix)[3]

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[1]61 Stat. 136, 29 U. S. C. S. 152(6) (7) (Supp. 1949).

[2]61 Stat. 135, *et seq.*, 29 U. S. C. 160(c) (Supp. 1949).

[3]Rules and Regulations of N.L.R.B. as amended August 18, 1948 (12 F. R. 5656, 5662, 13 F. R. 4872; redesignated as sections 102.46 and 102.48 in 14 F. R. 78).

his findings, conclusions and recommendations be adopted by the National Labor Relations Board and become its findings, conclusions and order all in conformity with Section 10(c) of the Labor-Management Relations Act of 1947 and the Administrative Procedure Act.[4] [R. 50.]

Subsequent to the issuance of the Intermediate Report and Recommendations, the General Counsel of the National Labor Relations Board filed with that Board a motion to reopen the record and remand the cause to the Trial Examiner to permit the adducing of the omitted evidence and for a redetermination of the applicability of the Labor-Management Relations Act of 1947 to petitioner. [R. 52-54.] A similar motion was filed with the National Labor Relations Board by the International Association of Machinists, the charging union involved. [R. 54-56.] Petitioner filed with the Board his statement in opposition to both motions, specifically raising the question of the Board's jurisdiction over petitioner not only because of the deficiency in the evidence but also upon the grounds that petitioner's business was local in character and did not affect commerce substantially. [R. 57-62.]

Both the General Counsel and the charging union requested and were granted on five different occasions, extensions of time within which to file exceptions to the Intermediate Report of the Trial Examiner, but none were ever filed. [R. 54, 62, 63, 64.]

On February 16, 1949, the National Labor Relations Board stated that neither the General Counsel nor the charging union had shown sufficient cause to warrant reopening the record to adduce evidence concerning the busi-

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[4]60 Stat. 237, 5 U. S. C. S. 1005, *et seq.* (Supp. 1949).

ness operations of Hudson Sales Corporation, the source of petitioner's new automobile purchases (see above) and denied their respective motions. [R. 65.] The Board, summarily held that even though these parties had not shown good cause to be permitted to adduce such additional evidence, the Board would erase this deficiency by taking judicial notice of a prior proceeding before the Board, in which it had asserted jurisdiction over the Hudson Sales Corporation,[5] and that because of its findings in this prior case is would hold that petitioner's business affected commerce within the meaning of Section 2(6) and (7) of the Labor-Management Relations Act of 1947, *supra*. None of the parties had requested the Board to take judicial notice of that case and the action of the Board was contrary to Section 10(c), *supra*, nor was petitioner a party to such prior case and was not confronted with it during the course of the hearing. [R. 65-67.]

The National Labor Relations Board then entered its order in which it found that petitioner's business affected commerce and remanded the cause to the Trial Examiner to make further findings with respect to the alleged unfair labor practices. The Board did not, however, permit the Trial Examiner to make independent findings with respect to the application of the Act to petitioner's business. [R. 65-67.] In this he was foreclosed by the summary and unrequested action of the Board.

Thereafter, pursuant to said directions, the Trial Examiner, on April 6, 1949, issued a Supplemental Intermediate Report [R. 68-88] but did not set aside his original finding of the lack of jurisdiction nor did he expressly adopt the summary findings of the Board. Rather he

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[5]Matter of Hudson Sales Corporation, 77 N. L. R. B. 378.

adhered to his prior conclusions, even though he felt bound by the action of the Board on the jurisdictional questions. [R. 69.]

No statement of exceptions was filed to the Supplemental Intermediate Report. This time the Board chose to purportedly follow the statutory provisions[6] and enter its order because of the fact that no statement of exceptions had been filed. It accordingly, adopted the Supplemental recommendations as its Order. [R. 88-91.] It gave no reason why it failed to follow the statute[7] and enter the original Intermediate Report and Recommendations as its Order, upon the failure of the parties to file exceptions to those findings and recommendations.

The National Labor Relations Board, pursuant to Section 10(e) of the Labor-Management Relations Act of 1947[8] petitioned the United States Court of Appeals for the Ninth Circuit for a decree enforcing the Order of the Board. [R. 91-96.]

The Court below granted a decree of enforcement of the Order of the National Labor Relations Board, one judge dissenting. [R. 100-110.] Relying chiefly on *Polish National Alliance v. N.L.R.B.*, 322 U. S. 643, and *Williams Motor Car Company v. N.L.R.B.*, 128 F. 2d 960 (C. A. 8), that Court held that, even though petitioner made all his purchases and sales within the State of California, he was, nevertheless, subject to the Labor-Management Relations Act of 1947, because the Board had held the new automobiles which petitioner sold had originated outside of that state, a finding the

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[6]29 U. S. C. 160(c) (Supp. 1949).

[7]*Id.*

[8]29 U. S. C. 160(e) (Supp. 1949).

Board made possible by a process of judicial notice which the lower court stamped as questionable. [R. 101.] The matter judicially noticed consisted of a finding, in a prior case to which petitioner was not a party and had no notice thereof, that Hudson Sales Corporation obtained new Hudson automobiles from sources outside the State of California; the Hudson Sales Corporation being the only source of petitioner to acquisition of such new automobiles. The Court noted that purchases of such new automobiles was relatively small and that petitioner's business was not large [R. 104] but stated that to hold petitioner was beyond the Board's jurisdiction would allow countless like retailers of new automobiles to engage in unfair labor practices with impunity, a holding not supported by any evidence in the record. It supported this conclusion by *Williams Motor Car Co. v. N.L.R.B., supra,* which is inapposite for the reason that the Williams Company received in interstate commerce shipments of the automobiles which it retailed.

Judge Stephens, dissenting, was of the opinion that the evidence did not sustain the conclusion that petitioner's business affected commerce. He stated that to so hold would bring all indefinite, remote and possible effects upon commerce within the ambit of the Labor-Management Relations Act of 1947 and render interstate commerce an indistinct thing capable of swallowing up all predominantly local businesses, and thus subject all to federal control. [R. 106-107.]

Petitioner had raised the question of the propriety of the taking of judicial notice, by the Board in the manner

in which it did, but the lower court disposed of this question on the ground that petitioner had not objected to such procedure before the Board, overlooking the extraordinary circumstances which surrounded the objection to action.

The incompleteness of the record upon review was brought to the attention of the Court below. The record in the *Hudson Sales Corporation* case was not certified, by the Board, to the Court below, as Section 9(d) of the Labor-Management Relations Act of 1947, requires.[9] That section provides that

> "whenever an order of the Board made pursuant to Section 10(c) is based in whole or in part upon facts following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under Section 10(e) . . ."

The Court below totally ignored such requirement.

The Court below also overruled petitioner's contention that the Board was mandated by Section 10(c) (*supra*) of the Labor-Management Relations Act of 1947 to enter the original Intermediate Report and Recommendations because no exceptions or objections had been filed as provided by law.

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[9]29 U. S. C. 159(d) (Supp. 1949).

Specification of Errors to Be Urged.

1. The Court below erred in holding that the National Labor Relations Board, without request to do so by any of the parties, can take judicial notice of a prior case in which petitioner was not a party.

2. The Court below erred in holding that the National Labor Relations Board may supplement deficiencies in the trial record by the process of judicial notice without complying with the statutory provisions of the Labor-Management Relations Act of 1947.

3. The Court below erred in holding that the Labor-Management Relations Act of 1947 is applicable to petitioner, a franchised retail automobile dealer who buys and sells all of his merchandise within the boundaries of the State of California.

4. The Court below erred in holding that it may decide a case, such as here presented without, having a full record before it, as required by the Labor-Management Relations Act of 1947.

5. The Court below erred in holding that the National Labor Relations Board is not conclusively bound by the Intermediate Report and Recommendations of its Trial Examiner, when no such exceptions to such report and recommendations have been filed by the parties within the time allowed by the statute or the time as extended by the National Labor Relations Board.

5. The Court below erred in holding that the National Labor Relations Board had afforded petitioner the requisite due processes of the law.

REASONS FOR GRANTING THE WRIT.

I.

The Conflict of Decision on Question of Judicial Notice.

1. The decision of the Court below in holding that the National Labor Relations Board legally and properly took judicial notice of findings it had made in a prior case to which petitioner was not a party and had no notice thereof conflicts with decisions on similar subjects by other courts of appeal. In *Divide Creek Irrigation Dist. v. Hollingsworth*, 72 F. 2d 859, the Court of Appeals for the Tenth Circuit had before it the propriety of the District Court's taking judicial notice of matters in prior cases between the same parties. The District Court, relying on matters decided in those prior cases, without requiring that they be introduced into the evidence of the case reviewed, entered its judgment. The tenth circuit held that trial courts may not thus take judicial notice of prior cases. The appellate court stated that trial courts' judgments are subject to review and in order to review them, a record of the proceedings in that case must be made for an appellate court which cannot take judicial notice of the records of every district in its jurisdiction. The Court further stated that questions of *res adjudicata* are often close and disputable, and adversaries ought to be notified of the plea and afforded an opportunity to meet them. Therefore, it said, that in a trial court a claim of *res adjudicata* must be pleaded, and if traversed, proof thereof must be made.

In the instant case there was a complete departure from the rule laid down in the *Divide Creek* case. The Board acted summarily and without request. The matter noticed was not entered into the record of the cause and the

Board did not even follow the statutory requirements for the taking of further evidence. Section 10(c) provides that where the evidence is taken before an agent of the Board, it shall be reduced to writing and filed with the Board. Thereafter, the Board in its discretion may take further evidence but only after notice is given to the parties. (See Appendix.) The Board gave no notice to any one of its proposal to take judicial notice of its findings in the prior case and foreclosed its Trial Examiner from making contrary findings based upon the record before him. This action the lower court sustains in direct conflict with the rule of taking judicial notice as laid down by the tenth circuit in the *Divide Creek* case.

The Court of Appeals for the Seventh Circuit, in *Paridy v. Caterpillar Tractor Company*, 48 F. 2d 166, cert. den. 278 U. S. 617, reached an almost identical conclusion as the tenth circuit did in the *Divide Creek* case. The seventh circuit held that a trial court must depend upon the evidence introduced into the record and not that which it may choose to supplement the deficiencies of the record before it; that the trial court could not resort to other cases to fill the gaps in the evidence. This decision the Court below also refused to follow.

In the instant case there was no pleading of the prior case as determinative of anything in the case at bar. Not only did trial counsel not introduce relevant portions of the prior case, but he declined to do so, electing to stand on the evidence which he had adduced as being sufficient to prove the question of the Board's jurisdiction.

The Court below, while terming the process of taking judicial notice, as the Board did, questionable, declined to follow its own decision in *National Surety Co. v. U. S.*, 29 F. 2d 92, in which it had reached similar results as were reached in the *Divide Creek* and *Paridy* cases.

II.

The Commerce Issue the Conflicts of Decisions.

2. There is a direct conflict between the decision of the Court below and the decision of the Court of Appeals for the Tenth Circuit in *N.L.R.B. v. Shawnee Milling Co.*, 184 F. 2d 57 (1950). The tenth circuit had before it an identical consideration with respect to the Board's jurisdiction, as was presented to the Court below. In the *Shawnee* case. the Shawnee Company owned and operated a flour mill and facilities at Shawnee, Oklahoma and products of which were shipped in interstate commerce. In addition it had a plant at Pauls Valley, Oklahoma, which was operated by a manager in complete control subject only to the overall policies and supervision by the officer of the Shawnee Company at Shawnee, Oklahoma, including all labor policies. All materials used by the Paul's Valley plant were purchased within the State of Oklahoma and all of that plant's products were sold and distributed within that state. Upon these facts the tenth circuit concluded that they did not warrant a holding the Paul's Valley plant to be within the Board's jurisdiction and the Court refused to enforce an order of the Board.

In the case at bar, like the *Shawnee* case, all purchases and sales of petitioner were admittedly made within the confines of the State of California. Whereas, the Paul's Valley plant was an integral part of the Shawnee Company, petitioner is an entity, separate and apart from either the Hudson Sales Corporation or the Hudson Motor Car Company. In the *Shawnee* case, the branch was subject to the overall policies and supervision, including labor policies, of the Shawnee Company. Petitioner is not so subjected to the supervision or policies of anyone

other than himself. Neither Hudson Sales Corporation nor Hudson Motor Car Company has any right of ownership, management or control of petitioner. He may sever his connection with Hudson Sales Corporation at will with or without reason.

As the tenth circuit pointed out in the *Shawnee* case, there is nothing in the instant record which warrants the majority below in reaching the conclusion that petitioner's business, "due to a strike, caused by unfair labor practices, would inevitably decrease the number of automobiles brought from without the state by the Hudson Sales Corporation." This conclusion is highly speculative and the majority below admit that any such decrease would be relatively small and that petitioner's business is not large. [R. 104.] This conclusion of the majority is sharply challenged by the dissenting judge who points out that the majority's conclusion, as applied to petitioner, is unwarranted by the record before the Court below.

III.

The Misapplication of the Decisions of This Court.

3. The decision of the Court below is believed to be erroneous and moreover, probably conflicts with the applicable decisions of this Court. It is generally conceded that the decisions of this Court in *Ohio Bell Telephone Co. v. Interstate Commerce Commission,* 301 U. S. 292; *Interstate Commerce Commission v. Louisville & Nashville R. Co.,* 227 U. S. 88, and *United States v. Abilene & Southern R. Co.,* 265 U. S. 274, laid down the rule to be followed by administrative agencies in noticing matters not a part of a record and prescribed the limits beyond which such administrative agencies may not go.

The *Ohio Bell* case, the most recent of these three decisions, bore directly upon the powers of an administrative agency to take judicial notice of matters in its files but which were not introduced into the evidence of the case under review by this court. Mr. Justice Cardozo, for the court, stated that the province of judicial notice rested in a large part on the notoriety of the matters noticed and that judicial notice when taken has no other effect than to relieve one of the parties to the controversy of the burden of resorting to the usual forms of evidence, but, he said, that does not mean that the opponent is prevented from disputing the matter by evidence if he believes the matter disputable. To press the doctrine of judicial notice as was done in the *Ohio Bell* case and as here, and to do it retroactively after the case had been submitted, in the words of Mr. Justice Cardozo, turns the doctrine into a pretext for dispensing with a trial.

Mr. Justice Cardozo, in the *Ohio Bell* case further states:

> "What has been done by the [Board] is subject to an objection even deeper . . . There has been more than an expansion of the concept of notoriety beyond reasonable limits. From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particulars or the evidential facts of which the [Board] took judicial notice and on which it rested its conclusions. Not only are the facts unknown there is no way to find them out . . . Even if they are copied in the findings without preliminary

proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. That opportunity is excluded here. The [Board's] withholding from the record the evidential facts (merely pointing out that we once did something and they teach us so and so) will never do if hearings and appeals are to be more than empty form."

Further Justice Cardozo declared:

"There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when the minimal requirements have been neglected or ignored."

Tested by the doctrine thus delineated, we find in the case before this court an arbitrary and summary action of the Board in taking of judicial notice. It is also significant that the Board took judicial notice only of its conclusions in the case noticed, but did not afford an examination of the facts upon which it had based those conclusions. The court below did not have before it the evidence upon which the Board rested its conclusion that the Hudson Sales Corporation was engaged in a business affecting commerce but "assumed" that the automobiles originated out of the state of California. As has been pointed out above, the Board did not certify to the court below the record or evidence in the *Hudson Sales* case, and the lower court disposed of the subject without having an opportunity of observing the propriety of the investigation or the correctness of the

conclusions drawn by the Board. We suggest that the actions of the court below did not conform to the pattern which Mr. Justice Cardozo so clearly outlined in the *Ohio Bell* case. Rather, it seems, the court below gave no proper consideration or weight to that decision.

Further, the court below, apparently holds that the Board may make use of information which it has in its files and which it feels is necessary to enable it to perform its functions and duties and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. In *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, this court dealt with a similar contention and found it to be without merit. The court there said in this connection:

> "But such a contention would nullify the right to a hearing—for manifestly there is no hearing when a party does not know what evidence is offered or considered and is not given an opportunity to test, explain or refute it . . . In such cases the [Board] cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered and must be given an opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. *In no other way* can it test the sufficiency of facts to support the findings; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the [Board] had be-

fore it extraneous, unknown, but presumptively sufficient information to support the findings. (Citing U. S. v. Baltimore & Ohio S. W. R. Co., 226 U. S. 14.)"

The court below disposes of these imperative authorities upon the grounds that petitioner did not except to the action of the Board. In doing so it seems to overlook the fact that only the conclusions were noticed and not the evidentiary facts and the further fact that the Board had made its decision on the subject without having afforded petitioner an opportunity to object to either the procedure or the matters noticed. The finality of the Board's action is shown by its remand to the Trial Examiner and the foreclosing of the Trial Examiner to make findings, on the commerce question, which he, in his own judgment, might choose to make, independently of the Board's fiat. When these considerations are coupled with the statutory command to the Board to first give notice to the parties prior to a supplementation of the record,[10] the incorrectness of the lower court's decision and the probable conflict with the applicable decisions of this court become glaringly revealed.

Both *Ohio Bell* and *Louisville & Nashville* cases emphasize the duty of the reviewing court to discover such improper actions and to protect the rights of the individual against such arbitrary abuses of power.

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[10]29 U. S. C. 160(c) (Supp. 1949).

IV.

The Incompleteness of the Record Below.

4. There is a further probable conflict with the decision of this court in *N.L.R.B. v. Foote Bros. Gear & Machine Corp.*, 311 U. S. 620, in which this court reversed and remanded that case to the court of appeals for the seventh circuit with directions to determine the question presented upon a record as required by the provisions of the National Labor Relations Act. In the instant matter, the Board was required, by Section 9(d) of the Labor-Management Relations Act of 1947[11] to certify to the court of appeals the record in the *Hudson Sales* case because the Board had based, in part, its order in the instant case upon facts purportedly ascertained by the investigation of the *Hudson Sales* case. In such circumstances the National Labor Relations Board, upon its petition for review of such an order, must send up the record for both cases so that the appellate court may have before it the complete factual records for review. Here, as in the *Foote Bros.* case no complete record, as required by the statute was presented to the reviewing court. In *Foote Bros.* case there was a narrative form of the record, admittedly complete, but it did not conform to the record which the statute required and therefore, this court sent the case back to be decided upon a record which satisfied the statutory requirement. Here there is no complete record. The determinative facts are being withheld from the court by the failure of the National Labor Relations Board to send up the record in the *Hudson Sales* case.

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[11]29 U. S. C. 159(d) (Supp. 1949).

V.

The Importance of the Questions Nationally.

5. Clearly, the questions presented are of importance in the administration of the Labor-Management Relations Act of 1947. The decision of the court below, if left to stand will affect approximately 40,000 franchised retail automobile dealers, similarly situated and located throughout the various states of the United States. There have been within the last year, approximately 50 cases,[12] decided by the Board involving approximately 100 retail automobile dealers, similar to petitioner, and in a majority of these cases the jurisdiction of the Board over each of them has been sharply challenged. These cases are now in varying stages before the Board or in the process of being presented to other courts of appeals to determine the jurisdictional question.

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[12] *Matter of Angelus Chevrolet Co.*, 88 N.L.R.B. No. 174; *Matter of Bill Heath*, 89 N.L.R.B. No. 12; *Matter of Dependable Motors*, 87 N.L.R.B. No. 193; *Matter of Fuller Automobile Co.*, 88 N.L.R.B. No. 245; *Matter of Given Motors, Inc.*, 87 N.L.R.B. No. 160; *Grace Motor Sales*, 88 N.L.R.B. No. 90; *Matter of Master's Pontiac Co., Inc.*, 88 N.L.R.B. No. 175; *Matter of Pasco Auto Co.*, 87 N.L.R.B. No. 113; *Matter of Strickler Motors*, 87 N.L.R.B. No. 113; *Matter of Reesmyer Motor Co.*, 88 N.L.R.B. No. 152; *Matter of Watts Motor Co.*, 87 N.L.R.B. No. 23; *Matter of Allen W. Fleming Co.*, 90 N.L.R.B. No. 118; *Matter Jefferson Lincoln-Mercury*, 90 N.L.R.B. No. 284; *Matter of Cadillac Automobile Co. of Boston*, 90 N.L.R.B. No. 85; *Matter of Coulter Jones & Sons*, 89 N.L.R.B. No. 136; *Matter of Dunlop Chevrolet*, 91 N.L.R.B. No. 172; *Matter of Earl McMillan, Inc.*, 90 N.L.R.B. No. 250; *Matter of Earl Severin, Inc.*, 90 N.L.R.B. No. 24; *Matter of Gilbert & Siebel Motors*, 20 C. A. 232, Apr. 28, 1950; *Matter of Green Bay Auto Parts Co.*, 91 N.L.R.B. No. 128; *Matter of Howell Chevrolet*, 89 N.L.R.B. No. 142; *Matter of Ivy-Russell Motor Co.*, 90 N.L.R.B. No. 260; *Matter of Lewiston Buick Co.*, 1 C. A. 498, July 17, 1950; *Matter of Massachusetts Motor Car Co.*, 90 N.L.R.B. No. 186; *Matter of McConeca Motors*, 90 N.L.R.B. No. 202; *Matter of Public*

In addition, the Board is citing this case as its authority, to sustain its various practices of judicial notice taking in matters subsequently considered by the Board and its Trial Examiners.

Settlement of the questions here presented, by this court is plainly in the public interest since they or some of them are likely to be presented in almost all of the cases involving franchised retail automobile dealers and in cases where the National Labor Relations Board assumes to take judicial notice to supplement deficiencies in the trial records.

It is also, in the public interest, to have set at rest, the finality of a Trial Examiner's Intermediate Report and Recommendations in the event no exceptions or objections are taken to such document. So far as we have been able

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Motors, 90 N.L.R.B. No. 273; *Matter of Rowan Motors Co.,* 90 N.L.R.B. No. 156; *Matter of Sheeley Motor Sales,* 89 N.L.R.B. No. 184; *Matter of Teague Motor Co.,* 91 N.L.R.B. No. 177; *Matter of University Motors,* 89 N.L.R.B. No. 146; *Matter of Baxter Bros.,* 91 N.L.R.B. No. 233 (Nov. 6, 1950); *Matter of Knapp Chevrolet Co.,* 91 N.L.R.B. No. 217 (Oct. 31, 1950); *Matter of Port Angelus Automobile Dealers,* 91 N.L.R.B. No. 206 (Oct. 31, 1950); *Matter of Anders Motors Company, Inc.,* 92 N.L.R.B. No. 124 (Dec. 15, 1950); *Matter of Tuscaloosa Lincoln-Mercury Co.,* 92 N.L.R.B. No. 132 (Dec. 14, 1950); *Matter of Tuscaloosa Truck & Tractor Co.,* 92 N.L.R.B. No. 133 (Dec. 14, 1950); *Matter of Harbor Chevrolet Co.* (not reported); *Matter of Wray Bros.* (not reported); *Matter of Adams Motors, Inc.,* 80 N.L.R.B. No. 1518; *Matter of Lawrence Holbrook,* 80 N.L.R.B. No. 1679; *Matter of Liddon-White Truck Co., Inc.,* 76 N.L.R.B. No. 1181; *Matter of Belle-Wyman Co.,* 79 N.L.R.B. No. 1424; *Matter of Harry's Cadillac-Pontiac Co.,* 81 N.L.R.B. No. 1; *Matter of Jack Taylor,* 85 N.L.R.B. No. 1336; *Matter of Rome Lincoln-Mercury Corp.,* 86 N.L.R.B. No. 387; *Matter of Rowan Motors Co.,* 90 N.L.R.B. No. 186.

to ascertain, this question has not been decided by this court, and while the question is novel, it is, undoubtedly, important in the administration of the Labor Management Relations Act of 1947.

Section 10(c) *supra* provides in part:

> "In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member or such examiner or examiners, as the case may be, *shall* issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon the parties, or within such further time as the Board may, authorize, *such recommended order shall become the order of the Board and become effective as therein prescribed.*" (Emphasis added.)

The *Administrative Procedure Act, supra,* contains a similar requirement. Section 8 of that act provides in part as follows:

> "Section 8. In cases in which a hearing is required to be conducted in conformity with section 7—(a) Action by Subordinates.—. . . Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency."

Admittedly, the Trial Examiner's Original Intermediate Report and Recommendations called for the dismissal of the complaint against petitioner on the grounds that there was a failure to prove by evidence the jurisdiction

of the Board over petitioner. Also, admittedly, no exceptions were filed by any of the parties to such Intermediate Report and Recommendations, although the Board kept the time open for nearly four months. Petitioner contended below, that the failure to file exceptions to this Intermediate Report and Recommended Order entitled him to have the Board enter the Trial Examiner's Recommended Order as the Order of the Board and hence a dismissal of the complaint. Petitioner contended that in the absence of such exceptions the Board had no choice but to follow the statutory mandate, because the statute clearly stated that the Recommended Order *shall become the order of the Board and become effective as therein prescribed.* [R. 111-112.] Not only is this a requirement of Section 10(c) of the Labor-Management Relations Act but is also a requirement of Section 8 of the Administrative Procedure Act, *supra,* which states that upon the failure to except, "such decision *shall* without further proceedings, become the decision of the agency."

The Court below denied this contention on the ground that such would not constitute a final adjudication in the proceeding. [R. 117.]

It is believed that the lower court erred, in this respect, and does not give to these statutes the effect which the Congress intended. It seems plain that the Congress intended orders entered under these statutory requirements to be final orders of the Board, "without further proceedings" or else the words of Congress are meaningless. The word "shall" as used in both the Labor-Management Relations Act and the Administrative Procedure

Act is not a dispensation of discretion. It is a command. The lower court says that even assuming the correctness of this contention, Section 10(d)[13] reposes jurisdiction in the Board to, *upon reasonable notice* "modify or set aside, in whole or in part, any finding or order made or issued by it." But the Board did not enter the original Intermediate Report and Recommended order as its order and even though it had, it seems from the language used by Congress, no intention of that body was given to the Board to set aside the clear statutory requirements.

Petitioner was, therefore, entitled to an order of dismissal, "without further proceedings."

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE J. NICOSON,
FREDERICK A. POTRUCH,
FINDLAY A. CARTER,
Counsel for Petitioner.

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[13]29 U. S. C. 160(d) (Supp. 1949).

APPENDIX.

The relevant provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. 141, *et seq.* (Supp. 1949)) are as follows:

"DEFINITIONS.

"Sec. 2. When used in this Act—

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

"PREVENTION OF UNFAIR LABOR PRACTICES.

"Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. . . .

"(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed

with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. . . . In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed. . . .

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia) or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined

therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for a leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that

the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon a writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

"REPRESENTATIVES AND ELECTIONS.

* * * * * * * * *

"(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony and proceedings set forth in such transcript."

The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C., Sec. 1005 *et seq.* (Supp. 1949) are as follows:

"ADMINISTRATIVE PROCEDURE ACT.

"Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

"(a) Action by Subordinates.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. *Whenever such officers make the initial decision* and *in the absence of either an appeal to the agency* or review upon motion of the agency *within time provided by rule, such decision shall without further proceedings then become the decision of the agency.* On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. *Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision* except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds that upon the record that the timely execution of its functions imperatively and unavoidably so requires."

"NATIONAL LABOR RELATIONS BOARD

RULES AND REGULATIONS

Series 5

and

STATEMENTS OF PROCEDURE

As Amended August 18, 1948

LABOR MANAGEMENT RELATIONS ACT, 1947

Exceptions to the Record and Proceeding

"Sec. 203.46. ***Exceptions or supporting briefs; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; oral arguments.***—

"(a) Within 20 days or within such further period as the Board may allow from the date of service of the order transferring the case to the Board, pursuant to section 203.45, any party may file with the Board in Washington, D. C., an original and six copies of a statement in writing setting forth exceptions to the intermediate report and recommended order or to any other part of the record or proceedings (including rulings upon all motions or objections), together with the original and six copies of a brief in support of said exceptions and immediately upon such filing copies shall be served on each of the other parties; and any party may, within the same period, file an original and six copies of a brief in

support of the intermediate report and recommended order, copies of such exceptions and briefs shall immediately be served on each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon. Upon special leave of the Board, any party may file a reply brief upon such terms as the Board may impose. Requests for such leave or for extension of time in which to file exceptions or briefs under authority of this section shall be in writing and copies thereof shall be immediately served on each of the other parties.

"(b) No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceedings.

"PROCEDURE BEFORE THE BOARD.

"Sec. 203.48. *Action of Board upon expiration of time to file exceptions to intermediate report.*—(a) In the event no statement of exceptions is filed as herein provided, the findings, conclusions, and recommendations of the trial examiner as contained in his intermediate report and recommended order shall be adopted by the Board and become its findings, conclusions and order, and all objections and exceptions thereto shall be deemed waived for all purposes."

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 562

M. L. TOWNSEND, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION.

OPINIONS BELOW.

The opinions of the Court of Appeals (R. 100, 116) are reported in 185 F. 2d 378. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 65-91) are unreported.

JURISDICTION.

The decree of the court below (R. 107) was entered on September 11, 1950. Petitioner's ap-

plication for rehearing was denied on November 22, 1950 (R. 116). The petition for certiorari was filed on February 19, 1951. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether petitioner, having failed to object before the Board although fully apprised of his opportunity to do so, is precluded by Section 10 (e) of the Act from challenging in the courts the validity of the Board's action in taking official notice of facts found by it in a prior proceeding.

2. Assuming question 1 is answered in the negative, whether the Board may properly take official notice of facts found by it in a prior proceeding.

3. Whether an automobile dealer whose annual sales of new automobiles exceed $70,000 is engaged in an activity affecting commerce within the meaning of the Act if the automobiles are manufactured outside the State but are purchased by him, under an exclusive franchise, from a distributor located within the State.

4. Whether the first Intermediate Report automatically became the order of the Board under Section 10 (c), notwithstanding that the Board had extended the time for filing exceptions thereto and had remanded the case to the Trial Examiner

before the expiration of the extended time for filing exceptions.

5. Whether Section 9 (d) of the Act, which requires the Board to file the record of a representation proceeding when it seeks judicial enforcement of a certification issued therein, is applicable where the Board, without objection, takes official notice of the commerce facts found in a prior proceeding.

STATUTES INVOLVED.

The pertinent provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C., Secs. 1005, *et seq.*), and of the Rules and Regulations of the Board are set forth in the Appendix, *infra,* pp. 20-23.

STATEMENT.

A. The Business of the Petitioner.

Petitioner is engaged in Santa Maria, California, in the purchase and sale of new and used automobiles, automotive parts and supplies, and fuels and lubricants, and also in the repair and painting of automotive vehicles. His purchase and sale of new automobiles is confined to Hudson automobiles, for which petitioner is a "Master Dealer" operating under a "Hudson Distributor-Master Dealer Sales Agreement", with exclusive rights to sell Hudson automobiles within the limits of Santa

Maria (R. 45-47; 11-19, 35-37).[1] The other party to the agreement is the Hudson Sales Corporation at whose premises in Los Angeles petitioner picks up all his new Hudson cars (R. 46; 15, 21-22). During the year 1947, petitioner's total sales for his entire business organization were in the amount of $346,341, of which $70,770,[2] represented sales of new Hudson automobiles purchased under the agreement from Hudson Sales Corporation (R. 45-46; 15-19, 35-37).

Hudson Sales Corporation is the direct distributor in the area for the Hudson Motor Car Co. The sales corporation has no factory and does not manufacture parts or assemble automobiles. (R. 46-47; 29-30). In an earlier proceeding before the Board (*Hudson Sales Corporation*, 77 NLRB 378), the Board found that during 1946 the latter corporation purchased Hudson automobiles, parts, and accessories valued in excess of $1,000,000, of which more than 75 percent was received from points outside the State of California (R. 66).

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[1] In the following statement, the references preceding the semicolon are to the Board's findings; the references following the semicolon are to the supporting evidence.

[2] The balance of petitioner's sales included used cars valued at $111,803, new automobile parts valued at $84,093, and service sales (including labor of mechanics and sale of gas and oil) valued at $79,737 (R. 45-46; 15-19). The Trial Examiner found that the foregoing operations of petitioner, exclusive of sales of new Hudson automobiles, are intrastate operations which do not affect interstate commerce. The Trial Examiner noted that the record did not indicate where the automobile parts were manufactured. (R. 46)

B. The Unfair Labor Practices.

In March and April 1948, during the course of an organizing campaign conducted at petitioner's garage by the International Association of Machinists, petitioner discharged three employees because of their union activity, interrogated several employees as to their union membership and activity, and warned or threatened other employees that union activity on their part would result in their discharge (R. 69-82). Upon these facts, not challenged here or in the court below, the Board found that petitioner violated Sections 8 (a) (1) and (3) of the Act (R. 84, 88-89).

C. The Proceedings Before the Board.

Following the customary proceedings under the Act, the Trial Examiner on October 27, 1948, issued an Intermediate Report in which he recommended dismissal of the complaint on the ground that the record before him did not establish that the new automobiles handled by petitioner "emanate[d] from without the State of California," and the evidence would therefore not support a finding that petitioner was engaged in operations affecting commerce within the meaning of the Act. (R. 44-50). The General Counsel and the Union each filed a motion to extend the time for filing exceptions to the Intermediate Report, together with a motion for remand to the Trial Examiner and for the reopening of the record, for the pur-

pose of adducing additional evidence with respect to the interstate aspect of petitioner's operations (R. 51-56). In support of his motion the General Counsel specifically directed the Board's attention to its decision in *Hudson Sales Corporation,* 77 NLRB 378, which "conclusively shows that 75 percent of all automobiles and other products sold by Hudson Sales Corporation are shipped to the Sales Corporation from points outside the State of California" (R. 52). Thereafter the General Counsel from time to time secured extensions of time within which to file exceptions, in order that the Board might first act upon his motion for remand (R. 62-64). The last extension of time for filing exceptions expired March 1, 1949 (R. 64).

On February 16, 1949, and before the expiration of time for filing exceptions, the Board issued an order remanding the case to the Trial Examiner (R. 65). The Board, taking judicial notice of the prior proceeding before it in *Hudson Sales Corporation, supra,* found that "a substantial portion of the [petitioner's] business involved the sale of new Hudson automobiles which were originally shipped from points outside the State of California" (R. 66). The Board also rejected petitioner's contention that it lacked jurisdiction because none of the cars came to petitioner directly, or were shipped by him across State lines (*ibid*).

Accordingly, the Board found (R. 67) that petitioner "is engaged in commerce within the mean-

ing of * * * the Act and that it would effectuate the policies of the Act to assert jurisdiction here." The Board remanded the proceeding to the Trial Examiner for the preparation and issuance of a Supplemental Intermediate Report, setting forth his findings of fact, conclusions of law, and recommendations with respect to the unfair labor practices alleged in the complaint (R. 67). At the same time, the Board specifically granted permission to the parties to file exceptions to its Decision within 20 days after service of the Trial Examiner's Supplemental Intermediate Report (R. 67, footnote 4).

The Trial Examiner on April 6, 1949, issued a Supplemental Intermediate Report, finding that petitioner's operations were within the scope of the Act and that petitioner had committed the unfair labor practices described at p. 5, *supra* (R. 68-83). The Trial Examiner recommended that petitioner be ordered to cease and desist from his unfair labor practices, to reinstate the discriminatorily discharged employees with back pay, and to post appropriate notices (R. 68-87).

The Trial Examiner, in noting (R. 68) that the Board had found that petitioner was engaged in commerce within the meaning of the Act, called attention to the fact that the Board had granted the parties permission to file exceptions to its Decision within 20 days after service of the Supplemental Intermediate Report. The Trial Exam-

iner also directed the attention of the parties to Section 203.48 of the Rules and Regulations of the National Labor Relations Board, Series 5, as amended August 18, 1948 (12 F. R. 5656, 5662; 13 F. R. 4872; redesignated as Section 102.48 in 14 F. R. 78), which provides that in the event no exceptions are filed with the Board, the findings, conclusions, recommendations, and recommended order of the Trial Examiner shall "be adopted by the Board, and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes" (R. 87).

On April 6, 1949, the Board entered an order transferring the case to the Board. On the same day, petitioner and his counsel were served with copies of that order and with copies of the Supplemental Intermediate Report. Petitioner at no time filed any exceptions to the Supplemental Intermediate Report and Recommended Order, or to the Decision and Order Remanding Case to Trial Examiner. (R. 88). Under Section 10 (c) of the Act and Section 203.48 of the Board's Rules and Regulations, time for filing such exceptions expired on April 26, 1949. Accordingly, on May 12, 1949, the Board adopted the findings, conclusions, and recommendations of the Trial Examiner as contained in the Supplemental Intermediate Report and issued the Order there recommended (R. 88).

D. The Proceedings in the Court of Appeals.

Petitioner resisted enforcement of the Board's order on the ground that the Board was not authorized to take official notice of its decision in the *Hudson Sales Corporation* case or of the facts set forth therein. Petitioner also contended that even if the Board could take official notice of the fact that the new automobiles which petitioner obtained from Hudson Sales Corporation were shipped to the latter from outside the State, the Board erred in concluding that petitioner's business affected commerce within the meaning of the Act.

The court below unanimously held that under Section 10 (e) of the Act petitioner's failure to object before the Board to the taking of official notice of the facts in the *Hudson Sales* case precluded his challenging the validity of that action before the court (R. 101-104). The court below also held, one member dissenting, that petitioner in handling new automobiles produced outside the state was engaged in an activity affecting commerce within the meaning of the Act (R. 104-106). Accordingly the court entered a decree enforcing the Board's order (R. 107-110).

On October 2, 1950, petitioner filed a petition for rehearing (R. 110) in which for the first time he urged that the order of dismissal recommended by the trial examiner in his first Intermediate Report became the order of the Board because no exceptions had been filed within the time permitted

by Section 10 (c) of the Act.[3] The court overruled this contention and held that, assuming the recommended order had become the order of the Board, the Board had not lost control over it and could, by virtue of Section 10 (d) of the Act, modify or set it aside at any time until a transcript of the record is filed in a court (R. 116-117).

ARGUMENT.

1. Section 10 (e) of the Act, in providing that "no objection which has not been urged before the Board * * * shall be considered by the court", precludes petitioner from challenging the validity of the Board's finding that the new Hudson automobiles handled by petitioner are produced outside the state. Although, as the court below observed (R. 101), petitioner was twice advised (R. 67, 68) of his right to file exceptions to the Board's action in taking official notice of its decision in *Hudson*

[3] This contention is without factual basis. As previously noted (*supra*, pp. 5-6), the record shows that when the General Counsel filed his motion for remand and for the reopening of the record, he filed simultaneously, and within the time permitted by Section 10(c) of the Act, a motion for the extension of time within which to file exceptions to the Intermediate Report. Section 10 (c) of the Act and Section 203.46 of the Board's Rules and Regulations provide for enlargement of time by the Board for the filing of exceptions. Thereafter, the time for filing exceptions was, upon motion, extended from time to time, to permit the Board to act upon the motion to remand. When the Board issued its decision remanding the case, the time within which to file exceptions, as thus extended, had not expired.

Sales Corporation, supra, and to the finding in this case, based thereon, that the new Hudsons handled by petitioner were produced outside the state, petitioner filed no exceptions, and hence cannot now argue that the Board erred in these respects. *National Labor Relations Board* v. *Cheney California Lumber Company,* 327 U. S. 385, 388; *Marshall Field and Company* v. *National Labor Relations Board,* 318 U. S. 253, 255.[4]

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[4] The courts of appeals have uniformly applied this rule. *National Labor Relations Board* v. *Cutler,* 158 F. 2d 677 (C.A. 1); *National Labor Relations Board* v. *Draper Corporation,* 159 F. 2d 294, 298 (C.A. 1); *National Labor Relations Board* v. *Parkers Prairie Cooperative Creamery Assn.,* 154 F. 2d 455, 457 (C.A. 8); *National Labor Relations Board* v. *Kinner Motors, Inc.,* 154 F. 2d 1007 (C.A. 9); *National Labor Relations Board* v. *Van De Kamp's Holland-Dutch Bakeries, Inc.,* 154 F. 2d 828 (C.A. 9); *National Labor Relations Board* v. *Winter,* 154 F. 2d 719, 722, n. 7 (C.A. 10); *National Labor Relations Board* v. *Dairy Center, Inc.* (C.A. 1, No. 4476); *National Labor Relations Board* v. *Israel Putnam Mills, Inc.* (C.A. 2, January 10, 1950); *National Labor Relations Board* v. *Gunn* (C.A. 3, No. 9822); *National Labor Relations Board* v. *Cordele Manufacturing Co.,* 172 F. 2d 225 (C.A. 5); *National Labor Relations Board* v. *Davis,* 172 F. 2d 225 (C.A. 5); *National Labor Relations Board* v. *Amory Garment Company,* 24 LRRM 2274 (C.A. 5); *National Labor Relations Board* v. *Lancaster Foundry Corporation* (C.A. 6, No. 10847); *National Labor Relations Board* v. *Ullin Box and Lumber Company* (C.A. 7, No. 9588); *National Labor Relations Board* v. *Burk,* 177 F. 2d 1021 (C.A. 8); *National Labor Relations Board* v. *Griffin-Goodner Grocery Co., Inc.,* 170 F. 2d 152 (C.A. 10). Cf. *Halsted* v. *Securities & Exchange Commission,* 182 F. 2d 660, 669 (C.A. D.C.) certiorari denied, 340 U.S. 834.

2. In any event, the Board properly took official notice of the commerce facts found by it in the *Hudson Sales Corporation* case. The right of the Board to take official notice is recognized by Section 10 (b) of the Act, which provides that an unfair labor practice proceeding "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure * * *," and by Section 7 (d) of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. § 1005), which provides that "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." Petitioner's difficulty is that he never asked the Board that he be "afforded an opportunity to show the contrary" of the facts officially noticed.

Contrary to petitioner's contention (Pet., pp. 13-17) the ruling below does not conflict with *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, and *United States* v. *Abilene & Southern R. Co.,* 265 U. S. 274. These decisions do not disapprove of the taking of official notice by an administrative agency where adequate safeguards are provided, such as those afforded to petitioner here. As one commentator has stated:[5]

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[5] Davis, *Official Notice,* 62 Harv. L. Rev. 537, 578 (1949).

These three cases, *Louisville & Nashville, Abilene & Southern,* and *Ohio Bell,* are the three principal cases in which Supreme Court holdings have imposed restrictions upon the use by an administrative agency of extra-record information. All three cases are consistent with the major proposition that extra-record information may be used so long as its use is properly made known to the parties so that the parties may have opportunity to rebut or explain in the appropriate way.

This Court has on several occasions sustained agency action in which the agency took judicial notice of its records in reaching its decision. *Market Street R. Co.,* v. *Railroad Comm'n,* 324 U. S. 548, 561-562; *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 529-530; *Securities Comm'n* v. *Chenery Corp.,* 332 U. S. 194, 204; *Tang Tun* v. *Edsell,* 223 U. S. 673, 680-681; *Crichton* v. *United States,* 56 F. Supp. 876, 880 (S. D. N. Y.), affirmed without opinion, 323 U. S. 684. In the *Pierce* case, *supra,* this Court, in commenting upon the decisions cited by petitioner here, said that "it has not undertaken to make a fetish of sticking squarely within the four corners of the specific record in administrative proceedings or of pinning down such agencies, with reference to fact determinations, even more rigidly than the courts in strictly judicial proceedings" and that "the mere fact that the determining body has looked beyond the record

proper does not invalidate its action unless substantial prejudice is shown to result." (327 U. S. at p. 530).

Equally untenable is petitioner's contention (Pet., pp. 10-11) that the decision below conflicts with other decisions of courts of appeals.[6] The cases cited by petitioner involved the propriety of taking judicial notice of a prior proceeding for the purpose of establishing an estoppel by judgment. In the instant case, on the other hand, although the Board took official notice of the fact that petitioner's supplier received automobiles from points outside the state, the fact so noticed did not thereby become undisputable or conclusive, and petitioner was "not prevented from disputing the matter by evidence, if he believe[d] it disputable" (Wigmore on Evidence (3rd ed., 1940) Sec. 2567). Apparently petitioner did not believe the matter disputable, as he has never claimed and does not now claim that the fact officially noticed—the out-of-state origin of the new Hudson automobiles—was untrue.

3. The holding of the court below (R. 104, *supra*, p. 9) that petitioner's activities affect commerce because a labor dispute which caused a cessation of petitioner's operations would necessarily curtail the movement of new Hudson automobiles into the state, is manifestly correct. Petitioner errs in

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[6] *Divide Creek Irrigation Dist.* v. *Hollingsworth*, 72 F. 2d 859 (C. A. 10); *Paridy* v. *Caterpillar Tractor Company*, 48 F. 2d 166 (C. A. 7), certiorari denied, 278 U. S. 617; *National Surety Co.* v. *United States*, 29 F. 2d 92 (C. A. 9).

suggesting (Pet., pp. 12-13) that the decision below conflicts with *National Labor Relations Board* v. *Shawnee Milling Co.*, 184 F. 2d 57 (C. A. 10). In the instant case the basis for the applicability of the Act is petitioner's handling of new automobiles produced outside the state; in the *Shawnee* case the materials handled at the plant in question were of local origin, and the asserted basis for the applicability of the Act was the fact that the employer operated other plants which were engaged in commerce. The decision that the Shawnee Company was not subject to the Act is thus not in conflict with the decision that petitioner's operations affect commerce.[6a] See *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 648; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 604-605; *Wickard* v. *Filburn*, 317 U. S. 111, 123-125; *Mandeville Island Farms Inc.*, v. *American Crystal Sugar Company*, 334 U. S. 219, 229, 234, 236; *United States* v. *Women's Sportswear Association*, 336 U. S. 460, 464; *United States* v. *Sullivan*, 332 U. S. 689, 696-697; *Allen Bradley Co.* v. *Local Union No. 3, etc.*, 325 U. S. 797, 800.

4. Petitioner's contention (Pet., pp. 21-23) that the original Intermediate Report recommending dismissal of the complaint automatically became the order of the Board because the General Coun-

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[6a] The Tenth Circuit has recently expressly limited its *Shawnee* decision to the peculiar facts of that case. *National Labor Relations Board* v. *Tri-State Casualty Ins. Co.*, No. 4139, decided March 21, 1951.

sel did not file exceptions thereto is without factual foundation. As previously indicated (*supra,* pp. 5-6), the Board had granted the General Counsel several extensions of time within which to file exceptions, pending consideration of the General Counsel's motion for a remand. When the Board issued its decision remanding the case, the General Counsel's time for filing exceptions had not yet expired. Under Section 10 (c), the Intermediate Report becomes the order of the Board only "if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize * * *." Since the General Counsel was not in default in the matter of filing exceptions when the Board remanded the case to the Trial Examiner, the recommended order of the Trial Examiner never became the order of the Board.

Even assuming, *arguendo,* that the Intermediate Report had automatically become the order of the Board, the Board had the power under Section 10 (d) to "modify or set aside, in whole or in part, any finding or order made or issued by it," inasmuch as the transcript of the record was still in its possession and had not been filed in a court. Petitioner's objection that this can be done only "upon reasonable notice" was satisfied when the Board provided in its Decision (R. 67) that any party could file exceptions to the Decision within twenty days after service of the Trial Examiner's Supplemental Intermediate Report.

5. Petitioner's contention that because the Board took official notice of the *Hudson Sales* case it was required by Section 9 (d) to supply a certified copy of the record therein as part of the record in this case rests upon a misconception of Section 9 (d).[7] It is clear from the legislative history that the purpose of that Section was to give an employer an opportunity to have a representation proceeding reviewed if he refused to abide by the Board's certification, and was thereafter proceeded against by the Board upon charges that he had refused to bargain with the certified union. As stated in Senate Report No. 573, 74th Cong., 1st Sess., p. 14 (Legislative History of the National Labor Relations Act, 1935, Vol. II, Gov. Print. Off. 1949, p. 2314):[8]

> Section 9 (d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. * * * But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representa-

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[7] The contention is obviously an afterthought, urged for the first time after the decision of the Court of Appeals (R. 112). Manifestly, if this contention had been timely urged, the alleged defect could have been remedied by having the Board supply a certified transcript of the proceedings in the *Hudson Sales* case.

[8] See also, Comparison of S. 2926 (73rd Congress) and S. 1958 (74th Congress) Senate Committee Print, p. 3 (Legislative History of the National Labor Relations Act, 1935, Vol I, Gov. Print. Off. 1949, p. 1323).

> tives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by an aggrieved party in the Federal courts in the manner provided in Section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election.

In the case at bar, of course, there is no suggestion that the Board's order is in any way "predicated upon the election" in the *Hudson Sales* case; it is a purely fortuitous circumstance that the facts of which the Board took official notice were developed in a representation proceeding rather than in an unfair labor practice case.[9]

CONCLUSION.

The decision of the court of appeals is correct and presents neither a conflict with other decisions

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[9] Petitioner's suggestion (Pet., p. 18) that the decision of the court below is in probable conflict with *National Labor Relations Board* v. *Foote Bros. Gear & Machine Corp.*, 311 U. S. 620, is patently without merit. As is evident from petitioner's own analysis of that case, the *Foote Bros.* decision did not involve the issue which petitioner seeks to raise here, but whether the printed record could be in narrative form instead of question and answer form.

nor any substantial question warranting review. The petition for certiorari should be denied.

Respectfully submitted,

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March 1951.

APPENDIX.

The relevant provision of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C., Sec. 1005) is as follows:

"Sec. 7 (d) * * * Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary."

The relevant provisions of the Rules and Regulations of the N. L. R. B., Series 5, as amended August 18, 1948 (12 F. R. 5656; 13 F. R. 4872; 14 F. R. 78) are as follows:

"Sec. 203.46 *Exceptions or supporting briefs; time for filing; where to file; service on parties, extension of time; effect of failure to include matter in exceptions; oral arguments.*—(a) Within 20 days or within such further period as the Board may allow from the date of service of the order transferring the case to the Board, pursuant to section 203.45, any party may file with the Board in Washington, D. C., an original and six copies of a statement in writing setting forth exceptions to the intermediate report and recommended order or to any other part of the record or proceedings (including rulings upon all motions or objections), together with the original and six copies of a brief in support of said exceptions, and immediately upon such filing copies shall be served on each of the other parties; and any party may, within the

same period, file an original and six copies of a brief in support of the intermediate report and recommended order. Copies of such exceptions and briefs shall immediately be served on each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon. Upon special leave of the Board, any party may file a reply brief upon such terms as the Board may impose. Requests for leave or for extension of the time in which to file exceptions or briefs under authority of this section shall be in writing and copies thereof shall be immediately served on each of the other parties.

"(b) No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceedings.

* * * * *

"Sec. 203.48 *Action of Board upon expiration of time to file exceptions to intermediate report.*— (a) In the event no statement of exceptions is filed as herein provided, the findings, conclusions, and recommendations of the trial examiner as contained in his intermediate report and recommended order shall be adopted by the Board and become its findings, conclusions and order, and all objections and exceptions thereto shall be deemed waived for all purposes."

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. III, Secs. 141 *et seq.*), are as follows:

"Sec. 9 * * * (d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

"Sec. 10 * * * (b) * * * Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

"(c) * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after

service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

"(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

"(e) * * * No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *"

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